

1  
2  
3  
4  
5  
6  
7 YEMA KHALIF, HAWI AWASH,  
8 Plaintiffs,  
9 v.  
10 CITY OF BELVEDERE et al.,  
11 Defendants.

Case No. 4:22-cv-04097-YGR

**ORDER GRANTING MOTION TO DISMISS**

Dkt. No. 39

12 Before the Court is defendants' motion to dismiss the Second Amended Complaint. (Dkt.  
13 No. 39.) For the reasons stated on the record at the March 8, 2023 hearing, the Court orders as  
14 follows: the motion is **DENIED** as to Claim 7<sup>1</sup>, **GRANTED WITH PREJUDICE** as to Claim 6, and  
15 otherwise **GRANTED WITH LEAVE TO AMEND**.<sup>2</sup>

16 Plaintiff shall file an amended pleading by Wednesday, **March 22, 2023**, and defendant  
17 shall respond two weeks thereafter.

18 As discussed at the hearing and pursuant to Local Rule 72-1, this matter is **REFERRED** to a  
19 magistrate judge to conduct a settlement conference in accordance with the assigned judge's  
20 calendar. Should the case settle, the parties are ordered to file a Notice of Settlement within two  
21 business days so that the Court may vacate any pending dates. The parties will be advised of the

---

22  
23 <sup>1</sup> Plaintiffs allege that Officer Clark's act of touching and then beginning to unholster his  
24 gun was excessive force in response to plaintiffs' conduct of lawfully standing on their property  
25 talking to officers. Defendants cite authority indicating that this is an inadequate basis for an  
26 excessive force claim. They cite, for example, *Foster v. City of Indio*, 908 F.3d 1204, 1218 (9th  
Cir. 2018) ("Neither we nor the Supreme Court have held that merely unholstering a firearm,  
without more, constitutes excessive force."). The Court takes plaintiffs failure to address this  
authority as a concession that they cannot plead an excessive force claim.

27 <sup>2</sup> As stated at the hearing, the Court finds the body camera footage of Officer Madfes and  
28 the Marin County Sheriff's Office's radio logs are incorporated by reference. *Khoja v. Orexygen  
Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018).

1 date, time, and place of the settlement conference by notice from the assigned magistrate judge.

2 This terminates docket number 39.

3 **IT IS SO ORDERED.**

4 Dated: March 10, 2023

5   
6 YVONNE GONZALEZ ROGERS  
7 UNITED STATES DISTRICT COURT JUDGE

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

United States District Court  
Northern District of California